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IN THE

**Supreme Court of the United States**

**October Term, 1937.**

No. [REDACTED]

**24**

**FRANK T. HINES**, Administrator of Veterans' Affairs,  
United States Veterans' Administration,  
*Petitioner,*

*v.*

**JAMES J. LOWREY**, Committee of the Person and Estate  
of **WILLIAM GARMES**, an Incompetent Person,  
*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court  
of the State of New York.**

**MEMORANDUM FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

**BENJAMIN C. RIBMAN,**  
**JAMES J. RICHMAN,**  
**LOUIS J. ALTKRUG,**  
*Counsel for Respondent.*



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1937.

IN THE MATTER

OF

The application of JAMES J. LOWREY,  
committee of the person and property of  
WILLIAM GARMES, incompetent, for an  
order authorizing him to pay a fee to  
counsel for legal services rendered the  
estate.

FRANK T. HINES, Administrator of Vet-  
erans' Affairs, United States Veterans'  
Administration,

Petitioner,

v.

JAMES J. LOWREY, committee of the person  
and estate of WILLIAM GARMES, an in-  
competent person,

Respondent.

No. 945.

## MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This memorandum is submitted in opposition to a petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department.



### Proceedings Below.

The statement of the proceedings in the State Courts, which appears at pages 3-5 of the petition for a writ in this case, recites substantially the proceedings had in this matter through the Court of Appeals of the State of New York.

### Question Involved.

The sole question involved is whether Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C. A., places any restrictions on the power of a State Court to allow an attorney a reasonable fee for services rendered by him for the benefit of the estate of an incompetent veteran, the administration of which is vested exclusively in the said State Court.

James J. Richman, an attorney at law, was awarded a fee of \$1,500 by the Supreme Court of the State of New York for services rendered by him on behalf of the estate of an incompetent veteran in connection with a claim for disability benefits arising under a policy of war risk insurance (R. 2-4). As a result of said services, the estate of the incompetent was increased by a recovery of fixed and contingent benefits amounting to a sum in excess of \$31,000 (R. 66-67). The Supreme Court of the State of New York made an order (R. 2-4) confirming the report of an Official Referee recommending a fee of \$1,500 for said services rendered by Mr. Richman. This order was unanimously affirmed by the Appellate Division of the Supreme Court (R. 81) and a motion for leave to appeal to the Court of Appeals was thereafter denied by said Appellate Division (R. 80). The Court of Appeals likewise denied said leave to appeal (R. 80).

Petitioner concedes that the question of the reasonableness of the fee is not an issue before this Court and is not reviewable by it (Petitioner's Brief, pp. 19, 23).

The reasonableness of the fee will be discussed only incidentally and in support of our contention that Congress did not restrict and never intended to restrict to \$10 the fee which a State Court would be empowered to award for services rendered by an attorney on behalf of the estate of an incompetent veteran.



## POINT I.

Congress, by enacting Section 500, World War Veterans' Act, did not place any limitations on the power of a State Court to allow reasonable fees for services rendered by an attorney for the benefit of the estate of an incompetent veteran. *Hines v. Stein*, 298 U. S. 94, is controlling.

The doctrine of *Hines v. Stein*, 298 U. S. 94, controls the decision in this case. The unanimous decision of this Court in that case requires the denial of the petition for a writ of certiorari here.

In the *Stein* case, the guardian of an incompetent veteran made an application to a Pennsylvania State Court for permission to pay an attorney out of the incompetent's funds a reasonable fee for legal services rendered by him and for expenses incurred in connection with the presentation before the Board of Veterans' Appeals at Washington, D. C. of a claim for pension or compensation. The Veterans' Administration did not question the reasonableness of the fee awarded by the Court, but contended that Congress, by enacting Sections 111, 114 and 115 of Title 38, U. S. C. A., had limited to \$2 the fee which could be awarded to the attorney for rendering the services in question. This Court rejected petitioner's contention and said as follows (p. 97):

"It is true that the provisions cited place general restrictions upon the fees of attorneys in connection with pension matters and prescribe the method of payment. But we find nothing in any of these Acts of Congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them. Conflict in respect of such matters between state courts and the federal government, its officers or bureaus, would be unseemly, perhaps extremely unfortunate. And in the absence of compelling language, we cannot conclude that there was intention to create a situation where this probably would occur. During many years, Congress has

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recognized the propriety if not the necessity, of entrusting the custody and management of funds belonging to incompetent pensioners to fiduciaries appointed by state courts, without seeking to limit judicial power in respect of them. \* \* \* Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction the promulgation of rules to that end by executive officers or bureaus.

"The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition or fraud. *Calhoun v. Massie*, 253 U. S. 170, 173, 64 L. Ed. 843, 845, 40 S. Ct. 474. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought."

Sections 111, 114 and 115 of Title 38, U. S. C. A., which were involved in the *Stein* case, and Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C. A., involved in the case at bar, are quoted in full in the appendix. The similarity between these statutes is apparent. We quote the pertinent portions thereof.

Section 500, World War Veterans' Act, involved in the case at bar, provides in part as follows:

"\* \* \* payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed \$10 in any one case:  
\* \* \* Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment."

Section 111, Title 38, U. S. C. A., involved in the *Stein* case, provides in part as follows:

"No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding \$25.00. \* \* \*"

Section 114, Title 38, U. S. C. A., involved in the *Stein* case, provides in part as follows:

"\* \* \* In all cases where application is made for pension, and no agreement is filed with the commissioner as herein provided, the fee shall be \$10 and no more. \* \* \* No greater fee than \$2 shall be demanded, received, or allowed in any claim for pension granted by special act of Congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed.

\* \* \* Any agent or attorney or other person instrumental in prosecuting any claim for pension, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or any agent, attorney, or other person instrumental in prosecuting any claim for increase of pension on account of the increase of disability for which pension was allowed, who shall directly or indirectly contract for, demand, receive or retain any compensation for such services, except as hereinbefore provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding \$500 or imprisoned, not exceeding two years, or both, in the discretion of the Court."

Section 115, Title 38, U. S. C. A., involved in the *Stein* case, provides as follows:

"The commissioner shall have power, subject to review by the Secretary, to reject or refuse to recognize

any contract for fees, provided for in section 114 of this title, whenever it shall be made to appear that any undue advantage has been taken of the claimant in respect to such contract."

The petitioner recognizes the obvious similarity between these sections for in his petition for writ of certiorari in the *Stein* case he said (p. 12):

"So far as material to this case, the effect of said Executive Orders (Regulations) and the Instructions issued by the Administrator of Veterans' Affairs pursuant thereto with respect to limiting the amount of the fee, is in substance the same as the provisions of Section 500 of the World War Veterans' Act, 1924 (43 Stat. 628, 38 U. S. Code 551), \* \* \* and the pension statutes mentioned above."

Every argument which the petitioner is now urging against the payment of a reasonable fee to counsel was advanced in the *Stein* case and considered insufficient by this Court.

In the *Stein* case, as in the case at bar, petitioner urged that the fee limitation provisions of the pension acts were applicable to cases involving both competent and incompetent veterans, that Congress intended in enacting these statutes to protect all beneficiaries from extortion, imposition or fraud, and that such a broad purpose should be effectuated even in cases involving estates of incompetent veterans. In answer to that argument, this Court said at page 98:

"The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition or fraud. *Calhoun v. Massie*, 253 U. S. 170, 173, 64 L. Ed. 843, 845, 40 S. Ct. 474. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought."

The Committee applied to the Supreme Court of the State of New York on notice to the petitioner for an order authorizing the payment of a reasonable fee to Mr. Richman for said professional services rendered by him to the estate of the incompetent veteran (R. 13-16). The Court referred the application to an Official Referee to take testimony and to report on the nature of the services rendered and the reasonable value thereof. A hearing was had before the Referee, again on notice to petitioner, who was represented throughout by counsel (R. 54-70). The report of the Official Referee (R. 70) was thereafter submitted for approval to the Special Term of the Supreme Court—again on notice to the petitioner—and was confirmed (R. 2-4). The Appellate Division of the Supreme Court, on petitioner's appeal, thereafter unanimously affirmed the order below (R. 81) and the Court of Appeals refused to review (R. 80). Certainly the Courts of the State of New York had ample opportunity to consider the reasonableness of the fee awarded to counsel and to fully protect the interests of the incompetent veteran.

This Court recognized the fact that if a State Court was restricted, as suggested by petitioner, to making an award of a fee of \$2 to an attorney for the services rendered by him as set forth in the *Stein* case, the State Court would be hamstrung in its management of and control over the incompetent veteran's estate committed to its care. Such an interpretation would constitute an impeachment of the sovereignty of the State by invading the jurisdiction of its Courts and usurping their functions and prerogatives. The result of such a view would in effect deny to the incompetent veteran the right to be properly represented by capable counsel. Congress, as this Court indicated in the *Stein* case, had no intention of so doing.

There is but one point of difference between the *Stein* case and the case at bar, and that difference strengthens our contention—the *Stein* case involved a claim for pension, whereas the case at bar involves a claim under a policy of war risk insurance. The rule in the *Stein* case, applying as it does to a pension, a *gratuity* granted by the Government, should *a fortiori* be the rule applicable to a policy of war risk insur-



ance, a contract. *Lynch v. United States* (*Wilner v. United States*), 292 U. S. 571. Certainly if a purported federal statutory restriction on the amount of a fee in a pension matter, which involves a *gratuity*, cannot interfere with a State Court's power to direct the payment of a reasonable fee for legal services rendered to an incompetent's estate in a pension matter, a similar restriction in a statute relating to war risk insurance, which involves a *contract*, has no greater force or effect.

Section 500, World War Veterans' Act, applies both to war risk insurance and to compensation or pension, thus indicating that Congress intended that the fee limitation provisions in compensation and pension cases should be similarly applied in war risk insurance cases. This similarity, as we have heretofore pointed out, is admitted by petitioner (*supra*, p. 6).

The insured made a contract with the insurer. The *Stein* case establishes that Congress never intended that one of the terms of this contract should restrict a State Court from allowing a reasonable fee to an attorney for services rendered on behalf of an incompetent insured. Mr. Richman's dated retainer (R. 70) placed the determination of his fee in the hands of the Court having jurisdiction.

*Hines v. Stein*, we submit, is controlling, and the petition for a writ of certiorari should therefore be denied. This Court has passed on the issues which petitioner now seeks to raise in this case. There is no occasion for any further review.

## POINT II.

### Concerning the Authorities Cited by Petitioner.

We do not intend to discuss at length the cases cited by petitioner in his brief. Most of the authorities cited were called to this Court's attention in the *Stein* case in the petition for a writ of certiorari, or in the brief submitted by petitioner after the writ was granted, or in the petition for a rehearing. *Furvis v. United States*, 61 F. (2d) 992, *Lopez*



*v. United States*, 37 F. (2d) 462, and *Margolin v. United States*, 269 U. S. 63, cited by petitioner, do not involve incompetent veterans. To the extent that certain cases decided prior to the *Stein* case are inconsistent with the rule established therein, they must be disregarded.

The petitioner relies very heavily on the authority of *In re Shinberg*, 238 App. Div. 74, 263 N. Y. Supp. 354. This case was called to this Court's attention in the *Stein* case not only in the petition for a writ, but also in the brief submitted by petitioner after the writ was granted. In the case at bar, petitioner urged the binding force of the *Shinberg* case before all the Courts of the State of New York. Not only did the *Stein* case reject the holding of the *Shinberg* case, but the Courts of the State of New York in awarding the fee to Mr. Richman have deliberately overruled the authority of the *Shinberg* decision.

In the opinion in the *Shinberg* case, the Court gave expression to the view that "there may be cases where the enforcement of this statute will result in a hardship," thus recognizing the harshness of petitioner's position. Thereafter, and in the case of *In re Bylow's Estate*, 153 Misc. 890, the Surrogate of Queens County in the State of New York took occasion to comment upon the "distasteful" result which the Court felt compelled to apply in the *Shinberg* case and said at page 894 of the opinion:

"An extreme illustration of the extent to which the courts will go in recognizing and enforcing the limitation may be found in *Matter of Shinberg's Estate*, 238 Appellate Division 74. The emphatic language of the statute there considered compelled the Court to reach a distasteful result."

In view of the decision in the *Stein* case, the Courts of the State of New York did not hesitate to reverse the ruling of the *Shinberg* case when the case at bar afforded them the opportunity.

A petition for a writ of certiorari has been filed by petitioner in *Hines v. Copsey*, No. 946, October Term, 1937. This case brings up for review a decision of the highest Court of the State of California and involves the identical problem

presented in this case. Petitioner seeks to draw comfort from the *Copsey* case, but we are at a loss to follow his reasoning. In the *Copsey* case, an attorney was awarded a fee of \$4,000 by the Superior Court of the State of California for services rendered by him in connection with the prosecution of a claim for war risk insurance benefits on behalf of the estate of an incompetent veteran. The Veterans' Administration appealed to the Supreme Court of the State of California on the ground that the fee was contrary to the provisions of Section 500, World War Veterans' Act. The respondent filed a motion to dismiss the appeal urging that the decision of this Court in the *Stein* case was controlling and hence that there was no issue before the Court. The Supreme Court of the State of California refused to dismiss the appeal, holding that the incompetent being a ward of the Court, the reasonableness of the fee was an issue for the Court to consider. By so holding, the Court recognized the binding effect of the *Stein* case. The Supreme Court of California thereafter, after considering the appeal on the merits, held that the fee allowed by the Superior Court was unreasonable. The Court said:

"For the guidance of the probate court in arriving at the proper fee to be allowed in the instant case, it may be appropriate to say that we are of the opinion that a fee which would be allowed to an attorney for a competent veteran if a suit had been brought as set out in Section 551, Title 38, U. S. C., is the maximum fee which may be allowed, and that probably a smaller fee would be more in accordance with the merits of the case." *In re Guardianship of Copsey's Estate*, 76 Pac. (2d) 691, at 695.

It thus is clear that the Supreme Court of the State of California recognizes that Section 551, Title 38, U. S. C. A., does not apply to attorney's fees for services rendered in connection with the estates of incompetent veterans, and that an attorney who renders such services is entitled to a reasonable fee. There is no uncertainty about the law in California. There is no conflict between the decisions of the California State Courts in the *Copsey* litigation and the decisions of the New York State Courts in the case at bar.

Petitioner in the case at bar is the petitioner before this Court in the *Copsey* case. That, we believe, disposes of the question of any alleged conflict between New York and California on this question.

The authorities relied on by petitioner furnish no basis for the granting of the petition for a writ of certiorari in this case.

### POINT III.

The petitioner, the insurer, because of a conflict of interest, cannot adequately assert the rights of the insured. The payment of a reasonable fee is necessary in order to enable the insured to retain independent counsel.

When the Government issued policies of war risk insurance it entered the insurance business. In consideration of the payment of premiums, the Government agreed to pay benefits upon certain contingencies. Certainly, a contracting party to an agreement cannot be considered as a proper person to protect the interests of the other contracting party. That there is a conflict of interest in such a situation is clear. That such a conflict of interest necessarily prevents petitioner from protecting the interests of a holder of such a policy is apparent from what occurred in the case at bar.

Disability benefits under the policy of war risk insurance were paid to the estate of the incompetent for the first time 14 years after the policy required the petitioner so to do. During all of this period there was information available in petitioner's files which, if acted upon, would have resulted in the payment of disability benefits to the incompetent long before 1934, when payments were commenced. Petitioner, on two occasions, denied liability, claiming that the policy had lapsed on May 1, 1920 for non-payment of premium when in fact the policy had then matured (R. 7).

The Government does not recognize any affirmative obligation on its part to initiate a claim for benefits under such

policies. Independent counsel representing solely the interests of the insured is essential for the proper protection of the rights of the insured under the contract. However, the insured will be denied the right to be properly represented unless he is permitted to pay a reasonable fee to an attorney of his own selection.

In cases involving incompetent veterans, the task of counsel is unusually difficult. The incompetent is unable to cooperate with his attorney in the preparation and presentation of his claim. This places an added burden on the attorney.

In view of these considerations, certainly Congress never intended that \$10 should be the maximum fee payable to an attorney who rendered services which resulted in the enrichment of the estate of an incompetent veteran by a sum in excess of \$31,000 in fixed and contingent benefits.

### CONCLUSION.

It is respectfully submitted that *Hines v. Stein*, 298 U. S. 94, decided by this Court on April 27, 1936, controls the decision in this case, and the petition for a writ of certiorari should therefore be denied.

Dated, New York, May 5, 1938.

Respectfully submitted,

BENJAMIN C. RIBMAN,  
JAMES J. RICHMAN,  
LOUIS J. ALTKRUG,  
Counsel for Respondent.

## APPENDIX.

### Statutes.

#### SECTION 551, TITLE 38, U. S. C. A. (SECTION 500, WORLD WAR VETERANS' ACT).

Except in the event of legal proceedings under section 445 of this chapter, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Parts II, III, and IV of this chapter, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed \$10 in any one case: Provided, however, That wherever a judgment or decree shall be rendered in an action brought pursuant to said section 445 of this chapter the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered, and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive, any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.



## SECTION 111, TITLE 38, U. S. C. A.

Compensation of agent or attorney. No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding \$25; nor shall such agent, attorney or other person demand or receive such compensation, in whole or in part, until such pension shall be allowed. In all claims allowed since June 20, 1878, where it shall appear to the satisfaction of the Commissioner of Pensions that the fee of \$10, or any part thereof, has not been paid, he shall cause the same to be deducted from the pension, and pay the same to the recognized attorney.

## SECTION 114, TITLE 38, U. S. C. A.

Same; agreement for fee filed; fee in case of failure to file; form; amount paid deducted from fee. The agent or attorney of record in the prosecution of the case may cause to be filed with the Commissioner of Pensions, articles of agreement, without additional cost to the claimant, setting forth the fee agreed upon by the parties which agreement shall be executed in the presence of and certified by some officer competent to administer oaths. In all cases where application is made for pension, and no agreement is filed with the commissioner as herein provided, the fee shall be \$10 and no more. And such articles of agreement as may be filed with the Commissioner of Pensions are not authorized, nor will they be recognized except in claims for original pensions, claims for increases of pension on account of a new disability, in claims for restoration where a pensioner's name has been or may hereafter be dropped from the pension rolls on testimony taken by a special examiner, showing that the disability or the cause of death, on account of which the pension was allowed, did not originate in the line of duty, and in cases of dependent relatives whose names have been or may hereafter be, dropped from the rolls on like testimony, upon the ground of nondependence, and in such other cases of difficulty and trouble as the Commissioner of Pensions may see fit to recognize them. No greater fee than \$2



shall be demanded, received, or allowed in any claim for pension granted by special act of Congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed. No fee shall be demanded, received, or allowed in any claim for arrears of pension or arrears of increase of pension allowed by any act of Congress passed subsequent to the date of the allowance of the original claims in which such arrears of pension, or of increase of pension, may be allowed. The articles of agreement herein provided for shall be in substance as follows, to wit: \* \* \*

And if in the adjudication of any claim for pension in which such articles of agreement have been, or may be, filed, it shall appear that the claimant had, prior to the execution thereof, paid to the attorney any sum for his services in such claim, and the amount so paid is not stipulated therein, then every such claim shall be adjudicated in the same manner as though no articles of agreement had been filed, deducting from the fee of \$10 allowed by law such sum as claimant shall show that he has paid to his said attorney. Any agent or attorney or other person instrumental in prosecuting any claim for pension, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or any agent, attorney, or other person instrumental in prosecuting any claim for increase of pension on account of the increase of disability for which such pension was allowed, who shall directly or indirectly contract for, demand, receive, or retain any compensation for such services, except as hereinbefore provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding \$500 or imprisoned, not exceeding two years, or both, in the discretion of the court. (Articles of Agreement omitted.)

## SECTION 115, TITLE 38, U. S. C. A.

Same; commissioner may reject contract for fees. The commissioner shall have power, subject to review by the Secretary, to reject or refuse to recognize any contract for fees, provided for in section 114 of this title, whenever it shall be made to appear that any undue advantage has been taken of the claimant in respect to such contract.